



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Stephen M. Haase

**SUBJECT: CONCURRENT SALE OF
FOOD AND ALCOHOL AT
GASOLINE SERVICE STATIONS**

DATE: September 7, 2004

Approved

Date:

INFORMATION

BACKGROUND

Over the past year, Planning staff has been directed to analyze the current prohibition to allow gas stations to concurrently sell food and alcohol, more popularly known as “gas station mini-marts”. In evaluating this land use issue, staff gathered input from the gas station industry as well as some interested citizens. Staff has concluded that any revisions to the Zoning Ordinance address the broader issues related to the off-sale of alcohol, over concentration, and the combination of commercial uses at gas station sites.

Should the City Council further direct staff to pursue elimination of the prohibition, the following actions should be included to ensure a comprehensive approach to evaluating off-sale alcohol outlets while providing predictability in the City’s regulatory process:

1. Direct staff to initiate proceedings to amend Part 7 of Chapter 20.80 of Title 20 of the San Jose Municipal Code to allow the concurrent sale of food and alcohol at gasoline service stations under certain circumstances, and amend Part 11 of Chapter 20.80 of Title 20, modifying the provisions related to the off-sale of alcoholic beverages;
2. Draft policy language for the City Council to consider related to the determination and findings of public convenience and necessity when considering a request for a liquor license exception; and
3. Rescind Resolution No. 67681 with regard to special concerns about alcoholic beverages licenses in certain census tracts.

Further, given the current Planning work plan, resources are not available to perform an in-depth economic analysis and/or geographic without impacting other Council directed items or allocating additional funding. Anecdotal conversations with the gas station industry reflects a changing market place for gas stations as evidenced by the diversification of the industry to include retail and restaurant uses to sustain and improve economic viability. Anecdotal

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conversations with the community have revealed a broad interest in the location of off-sale alcohol sales rather than a focused opposition to a single type of retailer. However, staff is available to complete the revisions described should the City Council endorse the policy approach developed from these conversations.

In a March 5, 2004 memorandum from Vice Mayor Pat Dando and Councilmembers LeZotte and Williams, it was requested that the discussion on the concurrent sale of food and alcohol at gas stations be tabled to allow staff to perform additional research and work to respond to a memorandum from Councilmember Campos (see attached memo dated February 24, 2004) as well as questions in their memo related to grandfathering of uses and additional controls on off-sale of alcohol establishments (see attached memo dated March 5, 2004).

Since the tabling of the item, the Director of Planning, Building and Code Enforcement (PBCE) and staff have met with industry representatives to discuss the issues and understand their needs related to the City's current prohibition and possible ordinance changes. Additionally, staff from PBCE and the City Attorney's Office has met with a representative from the State Department of Alcoholic Beverage Control, Mr. Robert Sylvia, to better understand the process involved in the issuance of liquor licenses. Much of the discussion and requests surrounding this topic has included both land use related issues as well as licensing related issues.

ANALYSIS

The purpose of this memo is to respond in a global manner to inquiries from the City Council, input and feedback from the industry and community, and discussions internally on the issue of off-sale of alcohol. It is clear to staff that, although the issue originally raised for discussion by the City Council focused on the concurrent sale of food and alcohol at gasoline service stations, the crux of the issue are conditions related to any off-sale of alcohol. Staff is prepared at this time to reiterate the options available to the City through land use regulations and policy development should the City Council desire, can direct staff to draft modifications to Title 20, the Zoning Code, and draft policy language related to the Liquor License Exception process to provide adequate opportunity to the City to regulate the establishment of off-sale alcohol uses whether in conjunction with the sale of gasoline or not.

Current Regulations related to Off-Sale of Alcohol

As has been stated in previous memos from this Department and the City Attorney's office, the regulatory role of the City is in the area of land use. Currently, a Conditional Use Permit is required for the off-sale of alcohol. These regulations do not distinguish between beer and wine or distilled liquors. It is clear to staff that should the City want in the future to distinguish between off-sales of beer and wine, and all other alcohol sales, there is the opportunity to articulate the land use differences between those two types of businesses and require either an amendment to an existing Conditional Use Permit or a new Conditional Use Permit (should the establishment be legal nonconforming) to address those differing elements.

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Additionally, the current regulations require that in order to approve a Conditional Use Permit of the off-sale of alcohol, the Planning Commission, or City Council on appeal, would need to find that the location of the establishment would not contribute to an “excess concentration”, or adversely impact schools or child care centers if located closer than 500 feet to said uses or residential uses if located closer than 150 feet. Since the primary control the City has relative to the off-sale of alcohol is in the area of land use, should the Council so desire, there is ample opportunity to modify the current regulations to create greater specificity as to the definition of “excess concentration”, and what criteria should be present should an establishment want to locate in close proximity to sensitive receptors, such as schools, child care, parks, etc.

Liquor License Exception Process

In addition to the land use regulations related to off-sale of alcohol, the City plays a critical role in controlling the issuance of liquor licenses in areas of “overconcentration” as established through the Caldera bill. As has been presented in memos from the Department and the City Attorney’s Office, in an area of “over concentration” relative to the number of liquor licenses or crime index, the ABC will deny any license for off-sale. The ABC can consider issuing a license in an area of over concentration only if the applicant receives a letter from the City that issuance of the license would be in the furtherance of public convenience or necessity.

The City of San José has established the Liquor License Exception Permit process to respond to requests for a letter of public convenience or necessity. The current guidelines in place for review of such request are open-ended for determining whether there is in fact a demonstrated public convenience or necessity present in order to support an exception request. The State has left it to the local jurisdiction to determine when there is a public convenience or necessity and does not challenge the City’s granting or denying such requests from a license applicant. Staff would recommend, should the Council want to move forward in this area, a policy recommendation for a discussion to establish criteria to use in the determination of public convenience or necessity when responding to a request for a Liquor License Exception. This tool can be critically helpful in appropriately limiting additional liquor licenses in areas of over concentration.

Resolution 67681 Related to Areas of Special Concerns About Liquor License Issuance

The above referenced resolution was originally adopted to respond the over concentration of Liquor Licenses in certain census tracts. This action dovetailed with the Caldera legislation and established in what instances the City would consider granting a determination of public convenience or necessity. Staff is of the opinion that if the City Council develops policy direction as discussed above; the need for said resolution is no longer necessary since the policy would establish the guidelines to be applied in all instances of over concentration and not a subset of the census tracts. In addition, recent projects have identified limitations to the current approach in dealing with the Area of Special Concern and the diverse interests of communities. These modifications would provide a more objective framework while allowing flexibility to community input.

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On August 24, 2004, the City received a study of the California market commissioned by ARCO that concluded a ban on the concurrent sale of alcohol at a gas station is not an effective policy approach for reducing the incidence of drinking and driving. Given the age of the report (over 10 years old) staff has no opinion on the validity of its conclusions. However, the analytical methodology utilized and the subsequent follow-up study to address several significant issues in the original survey is relevant information to this policy discussion. A copy of this report will be distributed to the Mayor and City Council under a separate cover letter.

CONCLUSION

The original topic for discussion over a year ago was the concurrent sale of food and alcohol at gasoline service stations and how the City's existing prohibition on that concurrent sale is impacting the upgrade of blighted properties in the City. Over time, the discussion has broadened to include the general topic of off-sale of alcohol and what role the City plays in the control of liquor licenses. Staff has focused on the concerns present in the memos received from Councilmembers and to reconcile those instances of conflicting policy direction.

Staff is confident that there are sufficient opportunities for the City to remove the prohibition on the concurrent sale of food and alcohol at gasoline service stations while still exercising control in the area of off-sale of alcohol through its land use regulations and authority to make a determination of public convenience and necessity through the granting of a Liquor License Exception Permit. Should the City Council agree with staff's recommendations to modify current land use regulations and develop Council policy in the area of Liquor License Exceptions, staff is prepared to work with the City Attorney's Office in the drafting of such ordinances and policies for Council consideration and take direction from the City Council in the drafting of a proposed policy. Should the City Council not be prepared to move forward with this issue at this time, Staff would recommend no change to the current regulations as an alternative to the selective modification of the Zoning Ordinance.

COORDINATION

Preparation of this staff report has been coordinated with the Police Department and the City Attorney's Office.

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Planning, Building and Code Enforcement